

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6474 OF 2006

Mrs. Khurshid Victor Macwan
and ors. ..Petitioners

Vs.

Mrs. Khorshed Kaikushroo
Darukhanawalla and ors. ..Respondents

Mr. A.K. Abhyankar, Senior Counsel with Mr. Rahul
S. Thakur for petitioners.

Mr. Anil C. Shingh i/by Mr. D.R. Shah for
respondent no.1.

CORAM: B.H. MARLAPALLE,J.

Reserved on : March 23, 2007.

Pronounced on : April 02, 2007.

P.C.:

1. This petition arises from the Judgment and
Order dated 1/4/2006 passed by the Small Causes Court
at Mumbai allowing Obstruction Notice No. 34 of 1997
in R.A.E. &b R. Suit No. 482/1754 of 1979 and the
same having been confirmed by the Appellate Bench of
the said Court by its Judgment and Order dated
17/7/2006 in Appeal No. 327 of 2006.

2. R.A.E. & R. Suit No. 482/1754 of 1979 was
filed by the predecessor of the present respondent
no.1 i.e. Mrs. Khorshed Kaikushroo Darukhanawalla

contending that she is the tenant in Flat No.7 in Ali Building, Wadia Street, Tardeo, Mumbai 400 034 and the tenancy was in the name of her father since 1943. The flat consists of four rooms, one kitchen, four balconies and the toilet block and out of the same two rooms, kitchen and two balconies were in her possession and the other two rooms and balconies were let out by her father to the original defendant Mrs. Goolo Phiroz N. Screwalla in or about 1944-45 and the rent was Rs.30/- per month which was increased to Rs.50/- per month. The original defendant was in arrears of rent and was a source of nuisance and annoyance and she was also not interested in the suit premises as she had gone to reside with her brother Mr.Minoo Master. As the defendant did not hand over the possession of the suit premises to her, the plaintiff issued a notice and terminated the tenancy and consequently filed the suit. During the pendency of the suit original defendant died on 1/1/1982 and hence defendant nos.1 to 7 were brought on record as the LRs of the deceased tenant. The newly added defendant no.2 Mrs.Tehmi Phiroze Meherji (for short referred to as Tehmi) used to visit the suit premises on and off and, therefore, the plaintiff obtained an

injunction against Tehmi restraining her from parting with the possession of the suit premises. During the pendency of the suit Tehmi also died in 1994 and as the other defendants, who remained absent, the suit was decreed in favour of the plaintiff on 31/1/1997 and the decree was ready on 21/4/1997. Execution proceedings were taken out against the defendants in June 1997 and a writ of possession was issued against the defendants. On 4/9/1997 at about 2 p.m. the plaintiff accompanied by the bailiff Shri A.D. Parab went to the suit premises to execute a writ of possession but none of the defendants were present in the suit premises, as all of them had their own residences elsewhere in Mumbai. However, warrant of possession was obstructed by the Obstructionist No.1 Mrs.Khurshid Victor Macwan on the grounds that she and her husband were residing in the suit premises and she would not vacate the same. Consequently, the Obstruction Notice was taken out by the original plaintiff.

3. Obstructionist No.2 Mr. Victor Macwan filed

his reply to the Obstruction Notice and opposed the same. He contended that one Freny Noshir Kerawalla

(for short Freny) was occupying the suit premises on the basis of an agreement of leave and licence dated 24/10/1970 signed between her and Tehmi and she was paying Rs.200/- per month as rent for the suit premises to Tehmi. Obstructionist No.1 is related to Freny and was living with her in the suit premises and on her marriage with Obstructionist No.2, both of them started residing in the suit premises. He further submitted that there was a dispute between Freny and Tehmi and, therefore, R.A.E. Suit No.451/93 was filed, in which plaintiff no.1 was Freny, praying for a declaration that she was the lawful tenant of the suit premises and for an injunction order restraining Tehmi from taking possession forcibly. The said suit was compromised in terms of the consent terms dated 18/6/1993 and the same were accepted by the court, resulting into a consent decree dated 22/6/1993. On

these grounds the Obstructionists opposed the

Obstruction Notice on the following issues:-

(a) That there was no allegation made by the plaintiff in the application that the warrant of possession was obstructed by the Obstructionists at the instance and

instigation of the defendants or either of the defendants.

(b) That the Obstructionists were claiming independent rights and they had no obstruction warrant of possession at the instance and instigation of the defendants or either of the defendants.

(c) That the obstructionists were claiming the rights of tenancy in good and bonafide faith.

4. Mr. Abhyankar the learned Senior Counsel relied upon the averments in the Obstruction Notice and submitted that as per the applicant-plaintiff herself the obstructionists had inducted themselves in the suit premises and, therefore, the said notice was not maintainable against them and, on the contrary, it was necessary for the plaintiff to institute a fresh suit for eviction. In this regard he referred to Order 22 Rules 97, 98 and 99 of C.P.C. and submitted that so long as the obstruction was not at the instance or on behalf or in collusion with any of the

defendants, the obstruction notice was not
 maintainable against the present occupants, namely,
 Obstructionist Nos.1 and 2. He further submitted that
 the title of the Obstructionist Nos.1 and 2 had
 derived from Obstructionist No.3 who had a valid
 agreement dated 24/10/1970 with Freny and the suit
 having been compromised by a consent decree passed by
 the competent court, it could not be nullified by the
 obstruction notice. Mr. Anil Singh the learned
 counsel for the respondent no.1, on the other hand,
 has taken me through the reasoning set out by the
 Small Causes Court in its order dated 1/4/2006 and
 duly confirmed by the Appellate Bench of the said
 Court and submitted that all the issues raised by the
 Obstructionist Nos.1 and 2 were duly addressed by the
 courts below and the contentions raised by them have
 been rejected. He further claimed that the
 Obstructionist Nos.1 and 2 had put up in collusion
 with Obstructionist No.3 a false and fabricated claim
 and Obstructionist No.3 herself had no legal title and
 she could not claim any such title through defendant
 no.2. He, therefore, supported the concurrent view
 taken by both the courts below and prayed for
 dismissal of the petition.

5. At this stage, it is required to be noted the following factual circumstances,

(a) R.A.E. & R. Suit No. 482/1754 of 19789 was filed only against Mrs. Goloo Phiroz N. Screwalla and till she died on 1/1/1982 none of the defendants were in picture i.e. defendant nos.1 to 7 and at no point of time during the life time of the original defendant, Freny ever claimed that she was occupying the suit premises on the basis of an agreement dated 24/10/1970 signed with Tehmi.

(b) The original defendant did not set up any such case till her life time for opposing the suit, nor did Tehmi who was brought on record as defendant no.2 ever claimed before the Small Causes Court in the said suit that she had the authority to sign leave and licence agreement and she had, in fact, inducted Freny in the suit premises on the basis of such leave and licence agreement.

(c) Till Tehmi was alive in or about 1994 either Freny or the Obstructionist Nos.1 and 2 ever raised the plea that they were the occupants of the suit premises on the basis of the leave and licence agreement. If it was their claim that there was a decree, passed on 22/6/1993, they did not apply for being impleaded as parties in the said suit.

(d) In R.A.E. Suit No.451 of 1993 the plaintiffs therein had not impleaded the present plaintiff Mrs. Khorshed Darukhanawalla as one of the defendants and the compromise decree, as noted by both the courts below, was obtained in collusion between Freny and Tehmi. Such a compromise decree would not be binding on the present plaintiff.

(e) It is not that the Obstructionist Nos.1 and 2 have inducted themselves in the suit premises and, in fact, in the reply to the Obstruction Notice filed by the plaintiff it is very clear that they claim their occupation

of the suit premises through Freny and allegedly Freny had signed an agreement with Tehmi for leave and licence in respect of the suit premises. Tehmi was one of the defendants in the suit and thus their obstruction is on the basis of a purported agreement with defendant no.2 and a consent decree obtained.

(f) There was a retraining order passed in R.A.E. and R. Suit No.482/1754 of 1979 against Tehmi and, therefore, she could not have introduced any one else in the suit premises after the said order.

6. While in the witness box the Obstructionist

No.2 stated that he was staying along with his mother at a distance of five minutes walk from the suit premises and he was married to Obstructionist No.1 in the year 1978 and after his marriage he started staying in the suit premises along with his wife and Freny. He further stated that they have two children and one room was in their occupation whereas the other room from the suit premises was occupied by Freny. He

further stated that Tehmi left the suit premises after 1970 and went to stay in Botawala Building at Dhobi Talao area. He further stated that defendant nos.3 to 7 were not occupying the suit premises before 1970. In the cross-examination he admitted that R.A.E. Suit No.451/93 was filed on 9/3/1993 and the consent terms were filed on 19/6/1993 i.e. within a period of three months. He further admitted that the suit was filed against Tehmi by Freny but he did not know whether the summons were served on the Constituted Attorney of Tehmi or on her personally. He further admitted that the suit was filed against the Constituted Attorney of defendant no.2 and obviously the consent terms were signed by the said Constituted Attorney on the basis of which the consent decree was obtained from the court. He stated that he was not wanting to examine the attesting witnesses in support of the agreement allegedly signed between Tehmi and Freny (Exh.2).

7. The Small Causes Court referred to the affidavit and para 22 (d) filed by Navil and in the same it was stated that during the life time of the plaintiff, the suit premises were given to the respondent no.3 under the agreement of leave and

licence dated 20/9/1972. This affidavit was drafted
 by M/s. Khilnani and Co. who were also the Advocates
 of the Obstructionists and, therefore, the Small
 Causes Court wondered how Navil Phiroz Tantra in
 Interim Notice No.1440 of 1989 could claim to be the
 occupant of the suit premises on the basis of the
 leave and licence agreement dated 20/9/1972 when Freny
 claimed the same title on the basis of the agreement
 dated 24/10/1970 with defendant no.2 and both the
 parties were represented by one and the same Advocates
 i.e. M/s. Khilnani and Co. This was one more
 circumstance to hold that the obstructionists were
 claiming their title through fabricated documents
 and/or the court decrees obtained by playing fraud on
 the court. Not only this, but in her depositions the
 Obstructionist No.1 made contradictory statements. In
 the examination-in-chief Obstructionist No.2 stated
 that Obstructionist No.3 is the grand mother of
 Obstructionist No.1, whereas in her depositions, the
 Obstructionist No.3 stated that Obstructionist No.1 is
 the daughter of her sister, but in cross-examination
 she stated that Obstructionist No.1 is her brother's
 sister's daughter. It was also clear that
 Obstructionist No.3 was staying at Lentin House at the

relevant time. The ration card at Exh.5 did not support the claim of the obstructionists and, therefore, the Small Causes Court recorded a finding that there was absolutely no evidence to suggest that Freny was at any time occupying the suit premises. Rent receipts at Exhs.14A to 14M and Exh.16 were discarded as fabricated documents.

8. In any case, the obstructionist nos.1 and 2 caused obstruction in the execution of the writ of possession claiming title through defendant no.2 and Freny and, therefore, the contentions of Mr. Abhyankar cannot be accepted. Both the courts below have concurrently held that the obstruction caused in the execution of the writ of possession was at the instance and instigation of the defendants or either of them and there was no independent right over the suit premises established by Freny. The obstruction notice was rightly allowed and confirmed by the Appellate Bench. In the case of Chandravaden Shukla and ors. vs. Mrs. Charulata Hashmukraj Dave [1990 Bom.R.C. 287] this court held that a licensee cannot create further licence because the licensee has the right only to occupy the premises. In the instant

case Tehmi could not be held to have any right as a tenant in respect of the suit premises in the month of October, 1970 or at least until the death of the original defendant in the year 1982 and, therefore, she could not have the authority in law to enter into any agreement with Freny or to give any licence in her favour. The courts below have rightly assessed all the circumstances to hold that the obstruction was made in collusion with the defendants or on the basis of a title claiming through defendant no.2 Tehmi.

9. Hence the challenge raised in this petition is devoid of merits and there is no case made out to cause interference in the concurrent findings recorded by both the courts below under the supervisory powers of this court under Article 227 of the Constitution.

10. Consequently, the petition is rejected summarily.

(B.H. Marlapalle,J.)